

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 93-3192  
Summary Calendar

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

HENRY LEE, SR.,

Defendant-Appellant.

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Appeal from the United States District Court for  
the Eastern District of Louisiana  
(CA 92-2114 (CR 89 295 I))

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(January 31, 1994)

Before REAVLEY, SMITH and DeMOSS, Circuit Judges.

PER CURIAM:\*

**BACKGROUND**

The defendant, Henry Lee ("Lee"), appeals the district court's denial of his motion under 28 U.S.C. § 2255 to vacate or set aside his sentence for ineffective assistance of counsel. Lee was initially tried before a jury and found guilty of conspiracy to distribute cocaine, possession with intent to distribute, and use of a firearm during commission of a drug

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\*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

trafficking offense. In his motion to vacate, Lee claimed that he was denied effective assistance of counsel during trial because his attorney, Wayne Mancuso ("Mancuso"), did not raise an entrapment defense or investigate witnesses pertaining to this defense, and did not allow Lee to testify on his own behalf. An evidentiary hearing was held, where it was stipulated by all parties that Lee's counsel did not present an entrapment defense because to have done so would have resulted in the disclosure of Lee's criminal drug record to the jury. We find no error in the district court's denial of Lee's motion.

#### **DISCUSSION**

In reviewing a denial of a § 2255 motion, we accept the district court's findings of fact unless clearly erroneous. United States v. Gipson, 985 F.2d 212, 214 (5th Cir. 1993). We review de novo questions of law. Id. In order to demonstrate ineffective assistance of counsel, Lee must meet both prongs of the test set forth by the Supreme Court in Strickland v. Washington, 104 S.Ct. 2052 (1984). The first prong requires that Lee show his counsel's performance fell below an objective standard of reasonableness, while the second prong requires a showing that his defense was prejudiced by his counsel's errors. Id. at 2064, 2068.

In determining whether a lawyer's chosen means of representation was reasonable, "[j]udicial scrutiny of counsel's performance [is] highly deferential." Id. at 2065. There is a strong presumption on review that the attorney's conduct

constituted "reasonable professional assistance." Id. First, Lee claims that Mancuso's representation fell below this standard because Mancuso wrongfully insisted that the entrapment defense was no longer available. We need not consider this claim since Lee previously stipulated that Mancuso did not pursue the entrapment defense because it would effectively reveal Lee's prior drug and criminal history to the jury. Furthermore, the district court's implicit rejection of Lee's explanation as to why Mancuso did not pursue the defense was not clearly erroneous.

Second, Lee claims that Mancuso's representation was not objectively reasonable because Mancuso did not contact witnesses to aid Lee's entrapment defense. Lee claims that if Mancuso would have investigated, he would have found that both Lee's mother and wife were eager to testify regarding the entrapment defense. Lee claims that their testimony would have shown that Lee was not predisposed to execute the criminal acts he committed. Mancuso decided not to present the entrapment defense, however, because it would probably fail due to Lee's numerous prior drug convictions. Mancuso had no reason to contact and interview witnesses regarding a potentially devastating defense which he had reasonably determined not to pursue.

Third, Lee claims that Mancuso erred by refusing to let him testify on his own behalf. In light of the fact that Lee had several previous drug offenses which could have been severely damaging to his defense, Mancuso's advice that Lee not testify

was not unreasonable. See Mays v. Estelle, 610 F.2d 296, 297 (5th Cir. 1980). Lee argues that under United States v. Teague, 953 F.2d 1525 (11th Cir.), cert. denied, 113 S. Ct. 127 (1992), a defendant has a fundamental constitutional right to testify, but we need not determine whether the right to testify is grounded in the Constitution. Even though the defendant in Teague claimed that he repeatedly urged his attorney to let him testify, the court in that case held that the representation was not ineffective since the evidence did not show that the defendant's will was "`overborne' by his counsel." Id. at 1535. Similarly, the evidence does not show that Mancuso's advice that Lee not testify was unreasonable, or that Lee's free will was somehow "overborne" by his attorney. Furthermore, because there is no indication that Lee's own testimony would have altered the verdict, even if Mancuso's actions arguably constituted error, it was harmless. See Wright v. Estelle, 549 F.2d 971, 974 (5th Cir. 1977), aff'd on reh'g, 572 F.2d 1071 (1978), cert. denied, 439 U.S. 1004 (1978). For the foregoing reasons, we affirm the order of the district court.

AFFIRMED.